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No. 3748

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. C. CHOU and JEW BEN ON,
Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellee.

APPELLANTS' OPENING BRIEF.

DION R. HOLM,
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Statement of Facts.

Jew Ben On was born in China and applied for admission into the United States before Edward White, United States Commissioner of Immigration at the Port of San Francisco, arriving at said port on the steamship "Tjikembang" November 26, 1920. The applicant claimed admission as the minor son of a lawfully domiciled merchant, to wit, Jew Ngow. The application was made when Jew Ben On was a minor. The matter was referred to a Board of Special Inquiry at Angel Island and on January 25, 1921, Edward White, as Commissioner of Immigra-

tion, denied the applicant permission to land on the sole ground that the mercantile status of Jew Ngow had not been established. The *relationship* between Jew Ben On and Jew Ngow is conceded, and the fact that Jew Ben On is a *minor* is also conceded.

The mercantile status of the father was denied by reason of his having performed certain manual labor not connected with his business.

From the finding of the Commissioner of Immigration an appeal was taken to the Secretary of Labor at Washington, D. C., and on March 18, 1921, the Secretary of Labor affirmed the decision of the Commissioner of Immigration and ordered the appeal of Jew Ben On dismissed and that he be deported to China.

On April 1, 1921, a petition for a writ of habeas corpus was filed in the Southern Division of the United States District Court in and for the Northern District of California in the First Division and thereafter a demurrer to the petition was filed and the matter argued before the court. On June 28, 1921, Judge Dooling sustained the demurrer to the petition, but did not file a written opinion. Thereafter an appeal was perfected to this Honorable Court.

The transcript of all testimony and proceedings had before the Commissioner of Immigration and the Department of Labor from the time Jew Ngow entered the United States are before this court on stipulation between the attorneys for the appellee

and appellants (pages 21-22 Transcript of Record). From these records the facts hereinafter stated are disclosed.

Jew Ngow, the father of the applicant, was born in China in 1868, and was known as Jew Mung and Du Mon. He first came to the United States in the year 1880 and since that time made two trips to China the first being on October 24, 1899, when he left this port as a merchant, returning July 14, 1902. On the second trip Jew Ngow sailed from the Port of San Francisco on October 5, 1909, with the status of a merchant and returned September 22, 1911. In 1899 Jew Ngow was a member of the Mow Lung Company of Merced. In 1909 he was a member of the Quan Yick Lee Company, which was also located in Merced. In 1918 Jew Ngow invested in and was one of the originators of the firm of Emory Chow Company, which company conducts a large general merchandise business in Selma, Fresno County, this state, and which interest he maintains to this date.

On February 10, 1894, at San Francisco, California, Jew Ngow applied for and was given a certificate of residence pursuant to the Act of Congress of May 5, 1892, at which time he proclaimed himself to be a Chinese laborer.

The evidence conclusively shows that Jew Ngow was financially interested in the Emory Chow Company of Selma at the time his son Jew Ben On applied for admission to land at this port, and that the former spent a large portion of his time in the

Emory Chow Company, and when temporarily absent kept in touch with the activities of said company by telephone and otherwise, and advised with the other members of the company as to the policy and conduct of the business affairs of said company.

It is admitted that Jew Ngow did not devote his entire time to the affairs of the Emory Chow Company, for the year prior to the arrival of his son Jew Ben On, and hence in that regard he did not measure up to the requirements of a merchant as defined by the courts and the Department of Labor.

Argument.

There is but one question for this court to determine and that question may be stated as follows:

IS A LABORER OF CHINESE DESCENT, WHO RESIDED IN THE UNITED STATES IN THE YEAR 1880, ENTITLED TO BRING INTO THE UNITED STATES MEMBERS OF HIS FAMILY?

It is our contention that the above question should be answered in the affirmative.

The first treaty between the United States and China concerning the admission of Chinese to this country was not proclaimed until October 5, 1881. The terms of the treaty were concluded on November 17, 1880, ratification was advised by the Senate May 5, 1881, and the treaty was ratified by the Presi-

dent May 9, 1881, and ratifications were exchanged July 19, 1881.

Article II of this treaty provides:

> "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, *and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord,* and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the *citizens* and *subjects of the most favored nation*" .

The first so-called Chinese Exclusion Act was passed May 6, 1882 (22 Stats. S. L. 58).

The sole and undisputed evidence in the case at bar as to when Jew Ngow first came to the United States is found at page 3 Immigration Records Exhibit "C". When Jew Ngow was having his status investigated prior to his first trip to China and on August 22, 1909, he testified he arrived in the United States in K. S. 6 (1880), which is not denied. At page 34 of the Immigration Record, pertaining to Jew Ben On, the father, on December 14, 1920, again testified in answer to the question

> "When did you first come to the United States? A. K. S. 6 (1880)".

The Chinese Exclusion Act of 1882 as amended in 1884 provides in Section 3 of said Act:

> "That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall

> have come into the same before the expiration of ninety days next after the passage of the act to which this act is amendatory. * * *''

From the foregoing it is clear that under Article II of the treaty between the United States and China that Chinese laborers shall be allowed to come and go of their own free will, and under subdivision 3 of the Act of 1884 it will be noted that the terms of the first Chinese Exclusion Act were not intended to apply to Chinese laborers who were in the United States on November 17, 1880, or who arrived in the United States within ninety days after that date.

In the case of Yee Won v. Edward White, No. 15 June 15, 1921, Advance Opinions U. S. Supreme Court, p. 690, a case originally decided in this court, Mr. Justice Reynolds at the commencement of the opinion states that the petitioner was

> *''a Chinese person first permitted to enter the United States in 1901* as a resident merchant's minor son, but who subsequently acquired the status of laborer and as such entitled to remain''.

In the instant case Jew Ngow, the father of the applicant, was lawfully in the United States on and *prior to November 17, 1880.*

The Supreme Court denied Yee Won the right to land, and the following language appears in the concluding paragraph of the opinion:

> ''This well defined purpose of Congress would be impeded rather than facilitated by *permit-*

> *ting entry of the wives and minor children of Chinamen who first came after the ratification of the treaty* as members of an exempt class, and later assumed the status of laborers. We think our statutes exclude all Chinese persons belonging to the *class defined as laborers except those specifically and definitely exempted* and there is no such exemption of a resident laborer's wife and minor children."

From the language of the Supreme Court above italicized it is the contention of appellants that the Supreme Court recognized that a different conclusion would be reached concerning the status of a Chinaman who was a laborer resident of the United States prior to the ratification of the treaty.

On page 9 of the brief for the respondent filed by William L. Frierson, Solicitor General of the United States, in Yee Won v. White, supra, which brief, of course, is not binding on this court, the Solicitor General practically conceded, as we contend, that Chinese laborers who were in the United States in the year 1880 have a different status entirely than those who arrived under an exempt status and later acquired the status of laborers, as the following language indicates:

> "All the legislation of Congress on this subject has been directed to the exclusion from this country of Chinese laborers. The prohibition against such laborers coming into the country is absolute, with two exceptions. Such laborers in this country at the time the treaty of 1880 was entered into are permitted to leave the country and return, *and indeed, are put in the same class with merchants*". (Italics ours.)

If this court will take the view that Chinese laborers who have arrived here prior to the conclusion of the treaty of 1880 are put in the same class as persons of an exempt status, it must follow in the case at bar that Jew Ben On should be admitted into the United States, and that his father should be accorded the comfort and companionship of his son, which is a natural right, and as the father has chosen the United States as his place of domicile, he should be accorded the further right of bringing members of his family from China to live with him.

The principle just stated has been proclaimed many times by the Supreme Court of the United States, by this court, and by the other federal tribunals. This right to bring members of one's family to the place of domicile of the head of the family has been extended to the wife and children of Chinese merchants and is conclusively acknowledged in the often referred to case of the United States v. Gue Lim, 176 U. S. 459, and then in earlier cases of In re Tung Yeong, 19 Fed. 184, In re Chung Toy Ho, 42 Fed. 398.

In conclusion we respectfully call the court's attention to the fact that Chinese laborers under Section II of the treaty of 1880 were accorded all the rights, privileges, immunities and exemptions which are accorded to citizens and subjects of the most favored nation. To inhibit a Chinese laborer who was lawfully domiciled in the United States prior to the treaty in question taking effect, from bringing members of his family to this country would not

be according him the rights, privileges, immunities and exemptions enjoyed by other classes of the Chinese race who under our exemption laws are given very limited rights, privileges, immunities and exemptions.

It is therefore respectfully submitted that the court below erred in sustaining the demurrer to the petition and this court should make its order directing that the demurrer be overruled and the writ of habeas corpus issue as prayed for in the petition.

Dated, San Francisco,
February 4, 1922.

Respectfully submitted,

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